No. 17-1351

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,

Plaintiffs-Appellees,

vs.

DONALD TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Defendants-Appellants.

**On Appeal from the United States District Court
for the District of Maryland**

Civil Action No. 1:17-cv-00361
The Honorable Theodore D. Chuang

BRIEF OF EPISCOPAL BISHOPS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE, IN OPPOSITION TO APPELLANTS' MOTION FOR A STAY AND ON THE MERITS

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I. IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are the Rt. Rev. Gladstone B. Adams III, Bishop Provisional of the Episcopal Church of South Carolina; the Rt. Rev. Patrick Bell, Bishop of the Diocese of Eastern Oregon; the Rt. Rev. Barry L. Beisner, Bishop of the Diocese of Northern California; Rt. Rev. Ian T. Douglas, Bishop Diocesan of the Episcopal Church of Connecticut; the Rt. Rev. Thomas Ely, Bishop of the Diocese of Vermont; the Rt. Rev. Mary Gray-Reeves, Bishop of the Diocese of El Camino Real; the Rt. Rev. Scott Hayashi, Bishop of the Diocese of Utah; the Rt. Rev. Mark Lattime, Bishop of the Diocese of Alaska; the Rt. Rev. Robert O'Neill, Bishop of the Diocese of Colorado; the Rt. Rev. Rayford Ray, Bishop of the Diocese of Northern Michigan; the Rt. Rev. David Rice, Bishop of the Diocese of San Joaquin; and the Rt. Rev. Gregory Rickel, Bishop of the Diocese of Olympia (also known as the Episcopal Church of Western Washington) (collectively, the "Bishops").[1] The Episcopal Church is organized into 111 geographic dioceses, which include more than 7,000 congregations. Each Bishop, whose authority in his or her diocese is both sacramental and constitutional within the Episcopal Church, governs the diocese, together with local representative bodies.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or a party contributed money that was intended to fund preparing or submitting this brief. No persons other than the amici curiae, their constituents, or their counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E).

Among the central tenets of the Episcopal Church (the "Church") are "to welcome the immigrant and the stranger," especially those who are poor, sick, and most in need of help, to provide a safe haven for those seeking freedom from oppression, and to uphold the dignity of every human being.[2] To that end, the Church has an active global missionary program and a refugee resettlement program here in the United States. The Church's multicultural ministries promote culturally and ethnically diverse congregations and encourage the dioceses to form global relationships "as part of the process of developing the cross-cultural nature of the Communion."[3]

Welcoming immigrants and helping refugees are some of the ways in which Episcopalians honor their baptismal covenant with God. The Bishops have made "commitment[s] to honor immigrants, refugees, and neighbors from different religions"[4] and are deeply concerned that the President's Revised Executive Order, like its immediate predecessor, violates these values and impairs their ability to practice these commitments. The Bishops earnestly believe that the Revised Executive Order impedes the ability of Episcopalians to practice their faith.

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[2] *Episcopal churches issue statement 'of shared values about immigration and refugees'; encourage others to sign*, Episcopal News Service (Mar. 16, 2017), http://www.episcopalchurch.org/library/article/episcopal-churches-issue-statement-shared-values-about-immigration-and-refugees.

[3] *Episcopal Church Mission Relationships*, http://www.episcopalchurch.org/page/mission-relationships.

This executive order has slammed the door on people who have suffered some of the greatest atrocities in recent times, and it does this solely on the basis of their religion. From its earliest inception, the United States has been a safe haven for followers of all religions, in part because religious tolerance is a value enshrined in the Constitution through the Establishment Clause. The President's Original Executive Order and his Revised Executive Order directly contradict these values, and in doing so undermine America's longstanding and special status as a place of refuge for the world's most vulnerable populations.

Both as leaders in the Episcopal Church and as members of the broader faith community, the Bishops have a deep interest in preserving this country's special status as a safe haven for immigrants and as a protector of the fundamental principle—enshrined in the United States Constitution—of religious tolerance.

[4] Episcopal churches issue statement 'of shared values about immigration and refugees'; encourage others to sign, supra note 5.

II. ARGUMENT

The Revised Executive Order, like its predecessor, undermines the United States' essential role as a safe haven for practitioners of all religions. From the beginning of his presidential campaign, President Donald J. Trump called for a "total and complete shutdown of Muslims entering the United States."[5] One week after he took office, the President made good on his threat by issuing an executive order banning everyone but religious minorities from seven majority-Muslim countries.[6] In the weeks that followed, the President and his senior advisors confirmed that this was his long-promised "Muslim ban."[7] When it became clear that the Original Executive Order would not pass constitutional muster, the President and his senior advisors revised its text, removed Iraq from the list, and issued the document as a Revised Executive Order.[8] The President and his senior advisors have made clear in fundraising e-mails[9] and statements to the press[10] that the Revised Executive Order has the same intent as the Original Executive Order—the implementation of the President's desired "total and complete shutdown of Muslims entering the United States."[11]

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[5] Donald J. Trump, *Statement on Preventing Muslim Immigration* (Dec. 7, 2015), www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration.

[6] *See* Protecting the Nation from Foreign Terrorist Entry Into the United States, Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) ("Original Executive Order")

[7] *E.g.*, *Full Transcript: President Donald Trump's News Conference*, CNN (Feb. 16, 2017), http://www.cnn.com/2017/02/16/politics/donald-trump-news-conference-transcript; Rebecca Shabad, *Donald Trump says he's expanding his Muslim ban*, CBS (July 24, 2016), http://www.cbsnews.com/news/donald-trump-says-hes-expanding-muslim-ban; Katie Reilly, *Donald Trump on Proposed Muslim Ban: 'You Know My Plans'*, Time (Dec. 21, 2016), http://time.com/4611229/donald-trump-berlin-attack (last accessed Mar. 13, 2017); Amy B. Wang, *Trump asked for a 'Muslim ban,' Giuliani says — and ordered a commission to do it 'legally'*, The Washington Post (Jan. 29, 2017), http://wpo.st/xzuY2 (last accessed Mar. 13, 2017).

Other *amici curiae*, including New York University and the Interfaith Coalition, have thoughtfully explained how the Revised Executive Order violates the Establishment Clause. The Bishops join in those arguments, and submit the following historical background and context for the Court's benefit.

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[8] *See* Protecting the Nation from Foreign Terrorist Entry Into the United States, Exec. Order No. 13,780, 82 Fed. Reg. 13210-11 (Mar. 6, 2017) ("Revised Executive Order").

[9] M. Zapotosky, D. Nakamura, & A. Hauslohner, *Revised Executive Order Bans Travelers from Six Muslim-Majority Countries from Getting New Visas*, Washington Post (Mar. 6, 2017), www.washingtonpost.com/world/national-security/new-executive-order-bans-travelers-from-six-muslim-majority-countries-applying-for-visas/2017/03/06/ 3012a42a-0277-11e7-ad5b-d22680e18d10_story.html?utm_term=.1f6730369a62.

[10] *Press Briefing by Secretary Sean Spicer, No. 18*, The White House (Mar. 7, 2017), www.whitehouse.gov/the-press-office/2017/03/07/press-briefing-press-secretary-sean-spicer-372017-18.

[11] Trump, *supra* note 5.

A. The Founders Adopted the Establishment Clause to Protect Against the Rise of Religious Persecution and to Ensure That the United States Remained a Safe Haven for Followers of All Religions.

The Founders adopted the Establishment Clause in part to stop the growing sectarianism and resulting religious persecution that plagued the British Colonies in the mid-1700s. They sought to enshrine America's role as a safe haven for followers of all religions and to guard against precisely the sectarian partisanship that underlies the Executive Orders at issue here.

From its earliest conception, the New World had been a haven for those fleeing oppression in the Old World. "A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches."[12] They came here to avoid "turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy."[13] But as life in the Colonies developed, the formerly persecuted became persecutors—often repeating "many of the old world practices and persecutions" they escaped.[14]

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[12] *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 8 (1947).
[13] *Id*. at 8-9.
[14] *Id*. at 10.

> It is an unfortunate fact of history that when some of the very groups which had most strenuously opposed the established Church of England found themselves sufficiently in control of colonial governments in this country to write their own prayers into law, they passed laws making their own religion the official religion of their respective colonies.[15]

Accordingly, Virginia's early code of laws imposed fines, whippings, or months in the gallows for failure to attend church twice daily.[16] The early Jews arriving in Maryland from Brazil were denied citizenship, the right to worship, and the right to operate public businesses.[17] In Puritan New England, religious minorities were punished with whippings, ear croppings, and even hangings.[18] "These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. . . . . It was these feelings which found expression in the First Amendment."[19]

The movement towards the Establishment Clause began in earnest in 1785 with a proposal to renew Virginia's tax levy for the support of the established Church of England.[20] In opposition to the proposal, James Madison wrote his famous *Memorial and Remonstrance*, in which he argued that renewing the levy for support of the Church was "a dangerous abuse of power . . . ."[21] Among his arguments is one that applies squarely to the Executive Orders at issue here. Madison cautioned that renewing the religious tax would be "a departure from that generous policy, which, offering an Asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens."[22] He specifically warned that victims of oppression abroad would look elsewhere for refuge if America fell into the trap of establishing a national religion and penalizing those who do not adhere to it:

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[15] *Engel v. Vitale*, 370 U.S. 421, 427 (1962).

[16] Patricia U. Bonomi, Under the Cope of Heaven: Religion, Society, and Politics in Colonial America 36 (2003).

[17] *Id*. at 43.

[18] *Id*. at 44.

[19] *Everson*, 330 U.S. at 11.

[20] See *id*.

> What a melancholy mark is the Bill of sudden degeneracy? Instead of holding forth an Asylum to the persecuted, it is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be in its present form from the Inquisition, it differs from it only in degree. The one is the first step, the other the last in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthrophy [sic] in their due extent, may offer a more certain repose from his Troubles.[23]

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[21] James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785).

[22] *Id*. at ¶ 9.

[23] *Id*. (emphasis added).

Madison's warnings proved extremely effective. Not only was the bill defeated, but the Virginia "Assembly enacted the famous 'Virginia Bill for Religious Liberty' originally written by Thomas Jefferson."[24] Madison's work and ideas spread beyond Virginia, and several other colonies considered similar legislation at the time.[25] In *Reynolds v. United States*,[26] the Supreme Court recognized that this movement led to the inclusion of the Establishment Clause in the First Amendment. As noted above, a fundamental argument in favor of the Establishment Clause was that religious discrimination is an anathema to the United States' special role as a beacon of hope and refuge for the oppressed.

B. The Revised Executive Order Undermines the Protection Against Religious Persecution Embedded in the Establishment Clause and the United States' Role as a Safe Haven for Followers of All Religions.

Beyond violating the letter of the Establishment Clause, the Revised Executive Order causes the very harms that James Madison identified in his *Memorial and Remonstrance*. It has shaken the world's faith in the United States as a home for people suffering religious, ethnic, political, and other strife; it has caused many to question the promises provided by the Constitution that sectarianism and religious persecution will never again infect the United States.

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[24] *Everson*, 330 U.S. at 12.

[25] *See Engel*, 370 U.S. at 428-29 (citing, *inter alia*, Sanford Hoadley Cobb, The Rise of Religious Liberty in America 74-115 (1902)).

[26] 98 U.S. 145, 164 (1878).

In the days following the signing of the Original Executive Order, the anxiety within Muslim communities that had been steadily rising throughout the presidential primaries,[27] turned to dread as families were torn apart and the future of individuals from the seven targeted countries became unknown.[28] International humanitarian organizations and leaders denounced the President's actions, including the United Nations Secretary General who stated that the

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[27] *See, e.g.*, Eric Lichtblau, *Hate Crimes Against American Muslims Most Since Post-9/11 Era*, The New York Times (Sept. 17, 2016), https://www.nytimes.com/2016/09/18/us/politics/hate-crimes-american-muslims-rise.html; Christopher Ingraham, *Donald Trump is bringing anti-Muslim prejudice into the mainstream*, The Washington Post (Aug. 1, 2016) https://www.washingtonpost.com/news/wonk/wp/2016/08/01/donald-trump-is-bringing-anti-muslim-prejudice-into-the-mainstream/?utm_term=.2ba9d2d240cf; Tim Mak, *Trump Rants Terrorize U.S. Muslim Capital* (Mar. 7, 2016), http://www.thedailybeast.com/articles/2016/03/08/trump-rants-terrorize-u-s-muslim-capital.html; Dean Obeidallah, *America facing anti-Muslim bigotry*, CNN (Feb. 23, 2015), http://www.cnn.com/2015/02/23/opinion/obeidallah-muslims-america-bigotry/.

[28] *See, e.g.*, Steve Benen, MSNBC, *Trump stumbles into international crisis with Muslim ban* (Jan. 30, 2017), http://www.msnbc.com/rachel-maddow-show/trump-stumbles-international-crisis-muslim-ban; Amy La Porte and Azadeh Ansari, *They were hoping to get to the US—and then Trump banned them*, CNN (Jan. 29, 2017), http://www.cnn.com/2017/01/28/politics/trump-visa-ban-families-refugees-stories/.

"measures [taken in the Executive Order] spread anxiety and anger" and that they "indeed violate our basic principles."[29] Lawmakers in Indonesia, home to the world's largest Muslim population, decried the Original Executive Order as an act that will "diminish the U.S. standing [sic] as a beacon for democracy."[30] German Chancellor Angela Merkel likewise remarked that the Executive Order is "against the core idea of international aid for refugees and international cooperation."[31] The world views the Executive Orders as America retreating from its traditional role as a protector of religious freedoms.

The uncertainty within Muslim communities subsided little after revocation of the Original Executive Order and the issuance of the Revised Executive Order, even for individuals no longer affected. Taif Jany, an Iraqi permanent resident in the United States, published an op-ed piece describing his fear: "[M]y country of origin has now been removed from the list of banned countries. But . . . I still fear for my future in this country. I worry that that future is now dangerously unpredictable and I simply don't feel safe anymore. What makes that feeling worse is the fact that I fled Iraq because of religious persecution; religious freedom is what made America feel like home for me."[32]

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[29] S. Sengupta, *U.N. Leader Says Trump Visa Bans 'Violate Our Basic Principles*,' N.Y. Times (Feb. 1, 2017), www.nytimes.com/2017/02/01/world/trump-immigration-ban-un.html.

[30] T. Salim, *RI Regrets Trump's Muslim Ban*, The Jakarta Post (Jan. 30, 2017), www.thejakartapost.com/news/2017/01/30/ri-regrets-trump-s-muslim-ban.html.

[31] A. Ansari, N. Robertson, and A. Dewan, *World leaders react to Trump's travel ban*, CNN (Jan. 30, 2017), www.cnn.com/2017/01/30/politics/trump-travel-ban-world-reaction/.

Moreover, religious persecution against Muslims and other minority groups increased during the presidential campaign[33] and the Revised Executive Order suggests tolerance of religious oppression.[34] Between January 1 and March 27, 2017—roughly the time period encompassing the presidential election and issuances of both Executive Orders—the Council on American-Islamic Relations (CAIR) recorded 35 attacks on mosques across 19 states, almost twice as many as the same time period in 2016.[35] CAIR also reports "almost daily attacks on American Muslims and other minority groups nationwide in recent months."[36] Data collected by the Center for the Study of Hate and Extremism at California State University in San Bernardino supports CAIR's assertions: "After then-Candidate Trump's Muslim ban announcement on Dec 7, 2015, in the next five days, we saw an 87.5-percent increase in hate crimes against Muslims."[37]

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[32]Taif Jany, *I Fled Persecution In Iraq, But Now I Fear For My Future In* America (Mar. 14, 2017), http://www.huffingtonpost.com/entry/trumps-immigration-policies-are-a-dangerous-threat_us_58c83227e4b02b847ccaa9dd; *see, e.g.*, *US cardinal: children are crying at school because they fear their parents will be deported*, Catholic Herald (Apr. 13, 2017), http://www.catholicherald.co.uk/news/2017/04/13/us-cardinal-children-are-crying-at-school-because-they-fear-their-parents-will-be-deported/

[33] Grant Smith and Daniel Trotta, Reuters, *U.S. hate crimes up 20 percent in 2016 fueled by election campaign-report* (Mar. 13, 2017), http://www.reuters.com/article/us-usa-crime-hate-idUSKBN16L0BO.

[34] *See* Press Release, CAIR Decries Trump Administration's 'Deafening Silence' on Series of Anti-Muslim Incidents Nationwide (Mar. 24, 2017), https://www.cair.com/press-center/press-releases/14225-cair-decries-trump-administration-s-deafening-silence-on-series-of-anti-muslim-incidents-nationwide.html.

The Revised Executive Order also undermines the efforts of religious organizations in the United States, including the Episcopal Church, to render aid to those fleeing war and oppression. Although the suspension of the United States Refugee Assistance Program (USRAP) is not before the Court, the Church's work with immigrants other than those arriving through USRAP supports individuals and families who flee war and oppression through other immigration opportunities. For many Americans, this type of immigrant-assistance work is an expression of their faith and one of the ways in which they keep their covenant with God. The Episcopal Church and its members provide a multitude of services to immigrants, including assistance in applications for visas and travel documents, housing assistance, citizenship classes, advocacy, and language tutoring.[38]

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[35] *This map shows how many mosques have been targeted just this year*, CNN.com (Mar. 20, 2017), http://edition.cnn.com/2017/03/20/us/mosques-targeted-2017-trnd/index.html.

[36] Press Release, CAIR Calls for Hate Crime Probes of Anti-Muslim Incidents in Wisconsin, Texas (Apr. 12, 2017), http://www.cair.com/press-center/press-releases/14272-cair-calls-for-hate-crime-probes-of-anti-muslim-incidents-in-wisconsin-texas.html

[37] Phil Lavelle, *Advocacy groups look for reason behind anti-Muslim hate crimes spike in US* (Mar. 14, 2017), https://america.cgtn.com/2017/03/14/advocacy-groups-look-for-reason-behind-anti-muslim-hate-crimes-spike-in-us; *see also Faculty in the News: CSUSB center's latest report on hate crimes gains news media attention* (Mar. 16, 2017), http://news.csusb.edu/2017/03/16/csusb-centers-latest-report-on-hate-crimes-gains-news-media-attention/.

The Revised Executive Order has caused and continues to cause significant harm to the very vulnerable people that the Church serves. These individuals and families are fleeing persecution, poverty, and war in their countries of origin, and because of the President's Executive Orders, they now face persecution in the safe haven they had been promised in the United States. The refusal to admit immigrants from the six targeted countries will not only rob families of hope and a future, but will also cost some of them their lives. It has and will continue to debilitate the immigration work of the Church and other religious efforts like it, and it will deprive Americans of the opportunity to practice their faith through service to others in need.

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[38] *Immigration Services*, Diocese of Seattle, http://www.dioceserroseattle.org/findservices/immigrationservices.html.

III. CONCLUSION

The words inscribed on the base of the Statute of Liberty invite the world to give America its tired, its poor, its huddled masses yearning to breathe free. This idea—that victims of oppression around the world will find refuge on our shores—is enshrined in the Establishment Clause and is given life in part by religious organizations like the Episcopal Church, who actively work to welcome immigrants as an expression of their own faith. The Revised Executive Order violates the letter and the spirit of the Establishment Clause. It deprives nationals of Syria, Iran, Sudan, Libya, Somalia and Yemen of the opportunity to live a life free from war and poverty and it deprives many Americans of the opportunity to practice their faith through service to others. For these reasons, the Bishops urge the Court to refuse to stay the District Court's injunction of Section 2(c) pending appeal and to affirm the District Court's injunction.

RESPECTFULLY SUBMITTED this 19th day of April, 2017.

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellees state that they are unaware of any related cases pending in this Court.

DATED this 19th day of April, 2017.

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